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IN THE

Supreme Court of the United States

October Term, 1961

No. 7

JOHN JOSEPH KILLIAN,

Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING

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Petitioner, John Joseph Killian, respectfully petitions the Court for rehearing and reconsideration of its decision of December 11, 1961 on the following grounds.

I

The majority's definition of "member."

Mr. Justice Whittaker's opinion concedes that membership in the Communist Party is not, in truth, a subjective relationship; it only appears to be a subjective relationship "to all but the organization and its member or members." It follows from this that the subjective definition of membership in the Communist Party which the Court approves in this case is erroneous as a matter of fact, as well as being a sharp departure from the definition of membership apparently laid down in *American Communications Association* v. *Douds*, 339 U. S. 382. The definition of the Court results in the manifestly absurd rule whereby a man who has never joined the Communist Party may be held, as a matter of law, to be a member of that Party.

The record in this proceeding demonstrates that membership in the Communist Party is, factually, an objective

relationship with a subjective element. The testimony of the government's own witnesses Fensholt, Sullivan and Ondrejka shows that, as members of the Communist Party, they were members of an organization with externalized objective qualifications for membership: payment of dues, attendance at formalized meetings, where decisions were taken by vote after discussion, assignment to subordinate units, formalized transfer between branches and areas, etc. (See Brief for the United States, pp. 4-6, 8-10).[1]

The majority opinion would justify the substitution of the subjective definition of membership for the true definition of that relationship on the grounds of necessity. The Court fears that otherwise it would be impossible to obtain evidence for conviction and the statute be violated with impunity. We respectfully submit that this proposition is neither constitutionally or factually sustainable and warrants rehearing.[2]

It is a fair summary of the Court's position that statutory terms in a criminal statute may be defined contrary to existing and actual reality, that the judicial branch of the government, by its supreme body may disregard actual fact and substitute fiction, if to do so will aid the prosecution and conviction of defendants. We submit that it is not the role of this Court but of the Legislature to rewrite the statute, and that if Congress had meant the word "mem-

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1. At the *Dennis* trial, *Dennis* v. *United States*, 341 U. S. 494 the government produced ten undercover agents who had been members of the Communist Party. Party membership cards for eight were offered in evidence. In addition annual registration cards and transfer cards were made a part of the record.

2. The argument from necessity is not unfamiliar. In the Sixteenth Century an eminent French Scholar and jurist stated, (Bodin: *Demonomanie* cited in Robbins: *The Encyclopedia of Witchcraft and Demonology*, Crown Publishers, 1959, at p. 54, 178)

> "One must not adhere to the ordinary rules of prosecution. In as much as the proof of such crimes is so obscure and so difficult, not one witch in a million would be accused or punished if the procedure were governed by ordinary rules."

ber" in Section 9 (h) to have a different meaning than the true one, it would have said so.

The necessity upon which the Court rests its departure from fact is groundless. The existence of the miniscule Communist Party, rent by faction, bedevilled by multiple prosecutions, riddled with government informers, poses no such threat to our institutions as would warrant impairment of those same institutions by abandonment of a fundamental principle of Due Process of Law. Counsel cannot cite one single case where a jury has acquitted a person of a crime involving Communist Party membership as an element. On the other hand, prosecutions and deportation proceedings abound where findings of Communist Party membership have been upheld by the appellate courts.[3] These convictions have rested upon admissions by the defendant, testimony of former Communists and (principally) testimony of paid government informers. The plethora of former Communists and the army of government informers insure that testimony is readily available against an active member of the Communist Party who violates the law. There is no necessity to plunder our national heritage and subject all persons to a danger of a thought control trial to achieve convictions of these few men.

In *Spies* v. *United States*, 317 U. S. 492, 500 this Court said,

> "The Government argues against this construction, contending that the milder punishment of a misde-

3. Example include *Fisher* v. *United States* (9 Cir., 1958), 254 F. 2d 302; *Sells* v. *United States* (10 Cir., 1958), 262 F. 2d 815; *Hupman* v. *United States* (6 Cir., 1955) 219 F. 2d 243; *Lohman* v. *United States* (6 Cir., 1959) 266 F. 2d 3; *United States* v. *Remington* (2 Cir., 1953), 208 F. 2d 567; *Scales* v. *United States*, 367, U. S. 203; *Noto* v. *United States*, 367 U. S. 290; *Bryson* v. *United States*, (9 Cir., 1956), 238 F. 2d 657; *United States* v. *West*, (6 Cir., 1960), 274 F. 2d 885; *Brown* v. *United States*, (5 Cir., 1960) 277 F. 2d 573; *Travis* v. *United States*, (10 Cir., 1957), 247 F. 2d 130; *Christoffel* v. *United States*, 345 U. S. 947. This list is not exhaustive nor intended to be. It does not even include Smith Act conspiracy cases.

> meanor and the benefits of a short statute of limitation should not be extended to violators of the income tax laws such as political grafters, gamblers, racketeers and gangsters. We doubt that this construction will handicap prosecution for felony of such flagrant violators. Few of them, we think, in their efforts to escape tax, stop with the mere omission of the duties put upon them by the statute, but if such there be, they are entitled to be convicted only of the offense which they committed."

Likewise in this instance active Communists may be successfully prosecuted for whatever their transgressions may be. As to those Communists who withdraw from organizational membership, the purpose of Section 9(h), the removal of Communist Party disciplined control of interstate commerce, will have already been served. In neither case does any necessity exist that this Court depart from fundamental principles and endanger the innocent to convict the guilty.

II

The Killian decision is in square conflict with the decision in *Cramp* v. *Board of Public Instruction* and *United States* v. *Lattimore* whose doctrine should prevail

It is respectfully submitted that the principles and rationale of the opinion of Mr. Justice Whittaker, speaking for the majority of the Court in the within case, conflicts sharply with the principles laid down in the opinion of Mr. Justice Stewart, speaking for the whole Court in *Cramp* v. *Board of Public Instruction of Orange County, Florida* (No. 72, October Term, 1961). This conflict vitiates the decision in *Cramp*, confines to exactly similar facts the protection which it appears to extend to First Amendment rights, and invites evasion of the principles enunciated therein by verbalistic variations in the form of test oaths.

Any attempted distinction between *Cramp* and *Killian* must be a distinction without a difference. In *Cramp* the outlawed oath required the affiant to swear that he had not lent his "aid, support, advise, counsel or influence to the Communist Party." In *Killian*, the Court held that a man might be prosecuted and convicted upon evidence that he had "advised" or "counselled" officers of members of the Communist Party, (Item "10" of the indicia of membership as given the jury), the very language of the Florida oath. Indeed *Killian* permits prosecution where Florida's oath would forbid it. For, where the Florida oath permitted prosecution only where the affiant had lent his "aid, support . . . or influence" to the Communist Party, the *Killian* decision permits prosecution (and conviction) where the defendant had not lent his "aid, support . . . or influence" to the Communist Party, but had merely indicated his willingness so to do. (Item 11 of the indicia of membership as given the jury reads,

> "has indicated by word, action, conduct, writing, or in any other way, a willingness to carry out in any manner or to any degree, the plans objectives or designs of the Communist Party.")

Among the other indicia of membership given the *Killian* jury, Items "1" (financial contributions of "any" kind), "2" (attendance at "any other type" of Communist Party gathering) and "5" (execution of Communist Party plans "of any kind") are merely general descriptions of alternative forms of the lending of "aid, support . . . or influence." Items "8" (conferring in behalf of "any plan") and "12" (participating "in any other way" in the planning of the Communist Party,) are merely synonyms for "advice" and "counsel."

It is no meaningful distinction between *Cramp* and *Killian* that *Cramp* made criminal what *Killian* made evidence of a subjective crime with no external characteristics. A

jury functioning under the *Killian* instructions would have to make the same ultimate decisions as would a jury in a perjury prosecution under the Florida Statute. This Court's opinion in *Cramp* states the vice of permitting prosecution under such criteria more eloquently than we can.

> "Could a lawyer who had ever represented the Communist Party or its members swear with either confidence or honesty that he had never knowingly lent his 'counsel' to the Party? Could a journalist who had ever defended the constitutional rights of the Communist Party conscientiously take an oath that he had never lent the Party his 'support'? Indeed, could anyone honestly subscribe to this oath who had ever supported any cause with contemporaneous knowledge that the Communist Party also supported it?
>
> "The very absurdity of these possibilities brings into focus the extraordinary ambiguity of the statutory language. With such vagaries in mind, it is not unrealistic to suggest that the compulsion of this oath provision might weigh most heavily upon those whose conscientious scruples were the most sensitive. While it is perhaps fanciful to suppose that a perjury prosecution would ever be instituted for past conduct of the kind suggested, it requires no strain of the imagination to envision the possibility of prosecution for other types of equally guiltless knowing behaviour. It would be blinking reality not to acknowledge that there are some among us always ready to affix a Communist label upon those whose ideas they violently oppose. And experience teaches that prosecutors too are human." (30 Law Week 4046).

The Court's questions in *Cramp* can be addressed with equal merit to the *Killian* indicia of Communist Party mem-

bership. Could a lawyer who had ever represented the Communist Party or any of its members not be found to have "advised" or "counselled" the Communist Party, or to have "conferred" with it on behalf of "any" of its plans. Could a journalist who had defended the constitutional rights of the Communist Party not be found to have "indicated by . . . writing . . . a willingness to carry out," in some manner and to some degree, "the objectives of the Communist Party." These possibilities cannot be dismissed as absurd. Within the past decade instances of this very nature have been trumpeted in our National Legislature as proof positive of Communist membership or affiliation. "There are some among us always ready to affix a Communist label upon those whose ideas they violently oppose." (*Cramp*, 30 Law Week 4046).

In *United States* v. *Lattimore* (D. C., D. C., 1953), 112 F. Supp. 507, *aff'd in part, reversed in part,* (C. A. D. C., 1954), 215 F. 2d 847 and in *United States* v. *Lattimore* (D. C., D. C., 1955), 127 F. Supp. 405, *aff'd* (C. A. D. C., 1955) 232 F. 2d 334, after flagrant and strident pressure from politically powerful forces the government sought to convict Professor Lattimore (who was and is one of our most eminent students of foreign affairs) of perjury for denying that he was a sympathizer or promoter of Communism or of Communist interests. The courts rejected these charges as speculative. Under the *Killian* decision the *Lattimore* persecutions should have been sustained. The instruction as to "affiliation" defined it as more than "sympathy." If "affiliation" as thus defined be not a speculative term, then it follows that "sympathizer" is likewise not speculative. If the approved indicia of membership may be used in ascertaining a "member" of the Communist Party without the stigma of unconstitutional vagueness, they may certainly define a "promoter" of Communism.

We cite the *Lattimore* case because we do not believe it is aberrant. A prolonged period of international tension inev-

itably produces peaks of jingoism and hysteria when the very process of independent thought is suspect, periods which later eras look back upon with shame and disgust. We are told by our highest national officers that we are in an indefinite period of international tension. Certain it is that in such a period as this the excesses of the early 1950's may be expected to reappear, and in aggravated form. In such a period it is the role of this Court (in the words of George Washington) to "raise a standard to which the wise and honest can repair." We submit the *Cramp* decision if consistently applied, supplies such a standard. We submit further however that while the present *Killian* decision stands, no enunciation of the principles set forth in *Cramp* can be a meaningful affirmation of constitutional right.

III

The definition of "affiliated with."

The definition of "affiliated with," dependent on the improper definition of "member" and the invalid "indicia" thereof, should be reconsidered on the ground alone. Reconsideration is likewise warranted (assuming the definition of "member" to be correct) by the Court's departure from the holding of *Bridges* v. *Wixon*, 326 U. S. 135, that "affiliation" must encompass the organization's "unlawful objectives," (326 U. S. at p. 147, see also 326 U. S. at pp. 143, 144).

In view of Mr. Justice Brennan's dissent, it is respectfully submitted, on authority of *American Communications Association* v. *Douds*, 339 U. S. 382 that the error of the trial judge was "fundamental" and that consequently the limitations of Fed Rules Crim. Proc. 30 do not apply.

CONCLUSION

For the foregoing reasons the petition for rehearing should be granted.

Respectfully submitted,

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Certificate

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

/s/ BASIL R. POLLITT
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